

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

GENE BRYANT)	
Claimant)	
VS.)	
)	Docket No. 1,054,346
STATE OF KANSAS)	
Respondent)	
)	
AND)	
)	
STATE SELF-INSURANCE FUND)	
Insurance Fund)	

ORDER

Respondent and its insurance fund appealed the May 8, 2012, Award entered by Administrative Law Judge (ALJ) Rebecca A. Sanders. The Workers Compensation Board heard oral argument on September 5, 2012. Joseph Seiwert of Wichita, Kansas, was appointed as a Board Member Pro Tem for purposes of this appeal in place of former Board Member David A. Shufelt.

APPEARANCES

Jeff K. Cooper of Topeka, Kansas, appeared for claimant. Nathan D. Burghart of Lawrence, Kansas, appeared for respondent and its insurance fund (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

In the May 8, 2012, Award, ALJ Sanders granted claimant permanent partial disability benefits based upon a 20% whole body functional impairment. The ALJ also ordered respondent to provide a physician authorized to provide claimant with medication that is necessary to cure and relieve the effects of his accidental injury.

Respondent contends claimant's whole body functional impairment is not more than 5% and requests the Board modify the ALJ's Award. It also maintains the Board should reverse the ALJ's order granting future medical treatment.

Claimant requests the Board affirm the ALJ's Award.

The issues before the Board on this appeal are:

1. What is the nature and extent of claimant's permanent functional impairment?
2. Is the medical treatment ordered by the ALJ reasonably necessary to cure and relieve the effects of claimant's work-related injuries?

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds:

Claimant injured his low back on October 14, 2009, when he slipped on a rug and fell as he was exiting from respondent's office building. At the time claimant was carrying a laptop computer in his right hand and fell onto his left side in order to protect the computer. Claimant testified that prior to the accident he had no back problems and had not seen a doctor for back pain. He received no temporary total disability benefits and continued to perform his regular job duties with respondent as an information technology support consultant.

The facts and history of this claim are detailed in the Award of ALJ Sanders. The Board adopts the Findings of Fact set out therein as its own.

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that

right depends.¹ “Burden of proof’ means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.”²

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.³

Four medical providers assigned claimant a permanent functional impairment. ALJ Sanders found the opinion of Dr. P. Brent Koprivica the most credible, and the Board concurs. When seen by Dr. Koprivica, claimant complained of back pain radiating into his hips. As indicated by ALJ Sanders, those complaints were confirmed by diagnostic tests and a physical examination. Dr. Koprivica extensively tested claimant for symptom magnification, and the results were negative.

Respondent is critical of the fact that Dr. Koprivica used the Range of Motion Model set out in the *Guides*⁴ rather than the Injury or DRE Model. Dr. Koprivica acknowledged the DRE Model is generally the preferred method under the *Guides* for rating an individual’s functional impairment. However, when an individual, such as claimant, has a multi-level condition, it is appropriate to use the Range of Motion Model to differentiate between DRE categories. Dr. Koprivica testified he could not tell whether, in claimant’s situation, DRE Lumbosacral Category II, III or IV would be most appropriate. Dr. Koprivica’s use of the Range of Motion Model to calculate claimant’s functional impairment was appropriate.

Drs. Peter V. Bieri and Donald T. Mead used the DRE Model of the *Guides* and placed claimant in DRE Lumbosacral Category II, giving him a 5% permanent functional impairment. Their opinions on claimant’s functional impairment are suspect. Dr. Mead determined claimant had no radiculopathy and his loss of motion segment integrity was less than 5 millimeters. Dr. Mead believed he could determine loss of motion segment integrity by reviewing claimant’s MRI. However, Drs. Koprivica and Travis Oller testified that utilizing flexion and extension x-rays is the correct method of measuring loss of motion segment integrity. In his report Dr. Bieri indicated he was not trained in the specialized

¹ K.S.A. 2009 Supp. 44-501(a).

² K.S.A. 2009 Supp. 44-508(g).

³ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212 (1991).

⁴ American Medical Ass’n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

radiographic technique required by the *Guides* to determine loss of motion segment integrity.

Dr. Oller's opinion on functional impairment was discounted by ALJ Sanders, and correctly so. Drs. Oller and Koprivica were the only medical providers who used flexion and extension x-rays in order to measure loss of motion segment integrity. However, Dr. Oller was the only expert who testified claimant had a sufficient loss of motion segment integrity to place him in DRE Lumbosacral Category V.

Dr. Oller is also the only medical provider to opine claimant had radiculopathy. He indicated loss of relevant reflexes is an appropriate method to determine radiculopathy. He acknowledged, however, claimant's reflexes were normal with one exception. The exception was that claimant had a diminished left patellar reflex, which is determined by a hammer tap to the knee. Similar testing by Drs. Bieri, Mead and Koprivica showed claimant's reflexes were normal.

In order to be placed in DRE Lumbosacral Category V, an individual must have radiculopathy and sufficient loss of motion segment integrity. The Board finds that a diminished left patellar reflex caused by a hammer tap by one physician is insufficient evidence of radiculopathy. Therefore, claimant cannot be in DRE Lumbosacral Category V.

Drs. Koprivica and Oller opined claimant will need future medical treatment. Dr. Koprivica also indicated claimant needs to be monitored and have medications to deal with chronic pain. Dr. Oller testified claimant would need continuing pain management. Dr. Bieri's report indicated claimant was not under active care, except claimant was taking Ibuprofen as needed. It also stated surgery and epidural blocks had been discussed, but deferred. That implies that epidural injections or surgery may be necessary in the future. The Board finds the medical treatment ordered by the ALJ is reasonably necessary to cure and relieve the effects of claimant's work-related injuries.

CONCLUSION

1. Claimant sustained a 20% whole body permanent functional impairment as the result of his work-related accident on October 14, 2009.

2. The medical treatment ordered by the ALJ is reasonably necessary to cure and relieve the effects of claimant's work-related injuries.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.⁵ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board affirms the May 8, 2012, Award entered by ALJ Sanders.

IT IS SO ORDERED.

Dated this ____ day of October, 2012.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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Rebecca A. Sanders, Administrative Law Judge

⁵ K.S.A. 2011 Supp. 44-555c(k).